

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)

Toll Free Service Access Codes)

CC Docket No. 95-155

RECEIVED

MAY 27 1997

PETITION FOR RECONSIDERATION

Federal Communications Commission
Office of Secretary

TLDP Communications, Inc. ("TLDP"), by its attorney and pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, hereby petitions the Commission for limited reconsideration of its Second Report and Order in the above-captioned proceeding, released April 11, 1997, and published in the Federal Register on April 25, 1997 ("Second Report and Order").¹

While TLDP strongly endorses the Commission's efforts to ensure that "toll free numbers ... be allocated among U.S. carriers on a fair, equitable and orderly basis," Second Report and Order, ¶ 1, TLDP objects to the Commission's decision to create a rebuttable presumption of hoarding or brokering where multiple toll free numbers are routed to a single subscriber and to allow service providers to terminate service to customers on the basis of the presumption without an affirmative finding by the Commission. For the reasons set forth, TLDP respectfully urges the Commission to eliminate the presumption from Section 52.107 of its rules and to declare that only the Commission has authority to render an enforceable ruling that hoarding has occurred.

¹ TLDP, which filed comments and reply comments earlier in this proceeding, is engaged in the marketing of 800 and associated interactive voice response services. Most of its customers use 800 services.

0214

Alternatively, TLDP urges the Commission to (a) provide guidelines for service providers as to how it expects them to enforce the presumption, (b) expand the telemarketing exception set forth in ¶ 40 of the Second Report and Order to include other legitimate uses of toll free numbers, and (c) determine that it is the reseller, not the facilities-based carrier, which has the obligation to enforce the Commission's new rules in a resale scenario.

I. Background

In its Second Report and Order, the Commission for the first time adopted rules designed "to ensure the efficient, fair and orderly allocation of toll free numbers." Second Report and Order, ¶ 3. While pledging "to rely on the industry, whenever possible, to solve implementation and operation issues associated with managing this numbering resource," the Commission concluded that neither its prior implementation plan for new toll free numbers, nor the Industry Guidelines for 800 Number Administration, assured adequate accountability. Id. at ¶ 18. To address these shortcomings, the Commission defined the warehousing of toll free numbers as an unreasonable and unlawful practice under Sections 201(b) and 251(e)(1) of the Communications Act, and required Responsible Organizations to certify that, for each toll free number reserved from the SMS database, they have a request from a potential subscriber. The Commission also concluded that both hoarding and brokering of toll free numbers were contrary to the public interest, and determined that such activities were subject to administrative sanction.

Pursuant to new rule section 52.107, hoarding is "the acquisition by a toll free subscriber from a Responsible Organization of more toll free numbers than the toll free subscriber intends to use for the provision of toll free service. The definition of hoarding

also includes number brokering, which is the selling of a toll free number by a private entity for a fee." The new rule provides that "[t]oll free subscribers shall not hoard toll free numbers," 47 C.F.R. § 52.107(a)(1), and that "[n]o person or entity shall acquire a toll free number for the purpose of selling the toll free number to another entity or to a person for a fee." 47 C.F.R. § 52.107(a)(2). The Commission also authorized service providers to terminate toll free service "[i]f a subscriber hoards numbers." Second Report and Order, ¶ 42.

In adopting the above requirements, the Commission observed that "[t]here is no way to determine if a subscriber is maintaining an inventory [of toll free numbers] because it may have a need for the numbers, or if the subscriber is building a supply of numbers for possible sale, but in either scenario the numbers are unavailable for toll free subscribers that have an immediate need." Second Report and Order, ¶ 40. In that context, the Commission concluded that, "to the extent that telemarketing service bureaus are performing legitimate services, and not merely buying and selling numbers, such activity would not be considered 'hoarding,' but that routing multiple toll free numbers to a single subscriber will create a rebuttable presumption of hoarding or brokering. Id. The Commission codified the latter presumption in new rule section 52.107(a)(3), 47 C.F.R. § 52.107(a)(3). In the text of its order, the Commission added "[o]ther factors that may be considered if a toll free subscriber is alleged to be hoarding or brokering numbers are the amount of calling of a particular number and the rate at which a particular subscriber changes toll free numbers." Id.

TLDP seeks reconsideration of these latter aspects of the Second Report and

Order. As framed, Section 52.107(a)(3) of the rules endorses the business practices of telemarketing firms, but discriminates against firms engaged in other legitimate uses of multiple 800 numbers, particularly large corporations, creating a presumption that hundred of thousands, if not more, users of 800 service are currently engaged in illegal activity. Contrary to sound administrative practice, the Commission has also apparently ceded all responsibility for the enforcement of its hoading rules to service providers. TLDP urges the Commission to address these deficiencies as set forth below.²

II. Hundreds of Thousands of Service Subscribers Use Multiple 800 Numbers

The application of the "rebuttable presumption" rule will have consequences which TLDP believes the Commission could not possibly have intended. TLDP's experience is that, with the exception of the very smallest businesses, most businesses today use more than one 800 number and many of the nation's largest businesses use hundreds or even thousands of numbers. A few examples of situations in which TLDP has encountered subscribers using multiple 800 numbers include:

1. Different 800 numbers for different departments -- e.g., sales, marketing, accounts receivable, customer service.
2. Different 800 numbers for different applications -- e.g., orders, information, catalogue requests, or customer service.
3. Different 800 numbers for internal and external use -- customers call on one number, employees out of the office call on another.

² In addition to the problems with the Commission's actions set forth below, it should be noted that neither the rebuttable presumption nor the telemarketing exception which the Commission has established were discussed in the Notice of Proposed Rulemaking in this proceeding, or discussed in any of the filed Comments or Reply Comments. The Commission's adoption of these measures under these circumstances violated well established administrative practice.

4. Different 800 numbers for different locations of a single business -- these are frequently billed on a single invoice and, therefore, considered a single subscriber by the service provider.
5. Separate 800 numbers for facsimile machines -- this is becoming increasingly prevalent in sales departments in particular.
6. Separate 800 numbers for electronic mail servers -- TLDP recommends to all its customers that they establish 800 numbers for their electronic mail servers, to avoid credit card and hotel surcharges for employees with laptops who access the servers while traveling.
7. Separate 800 numbers for remote LAN access -- same considerations as apply to electronic mail servers.
8. Separate 800 numbers for individual salesmen or customer service representatives -- avoids the cost, and wasted time, of routing calls through switchboards or ACDs, improving customer service by reducing delays in establishing a call connection; and
9. Multiple 800 numbers as a result of mergers and acquisitions -- the general practice is not to relinquish 800 numbers in such situations. Otherwise, customers unaware of the change may be unsuccessful in their efforts to contact the company which does not retain its name.

These are not exceptional situations. To the contrary, the routing of multiple 800 numbers to a single service subscriber has become a norm in all but the very smallest businesses, and is even becoming prevalent in one person operations (e.g., separate 800 numbers to access a computer or fax machine for taking orders). Moreover, there are probably hundreds of thousands of cases in which multiple 800 numbers are routed to a single 10 digit telephone number:

1. All of the major carriers offer a service which allows the subscriber to identify the 800 number dialed and route the calls accordingly. DID trunks have been used for decades to accomplish the same objective with non-800 numbers. One application of such a system is to give each attorney in a law firm a separate 800 number to access their voice mail. The attorney's call can be routed directly to his mailbox quickly and efficiently (even if there are

only two minutes left before a flight) without having to pull out a calling card or go through a voice response system.

2. For marketing purposes, many companies use different phone numbers for each major campaign. They are then able to track the effectiveness of their advertising or other marketing efforts by reviewing the call records for the particular 800 number. By exempting telemarketing firms from the application of the presumption, the Commission implicitly recognized the validity of this practice when performed by a third party. It is no less legitimate when performed by the business itself.
3. It is not uncommon for more than one company to share an office or building, with a single receptionist serving all of the companies involved. In such situations, several different subscribers frequently route 800 service to a single 10 digit phone number.
4. In recent years, many firms have obtained "vanity" 800 numbers for marketing purposes. In such situations, an existing 800 number is usually not disconnected, because the business does not want to take the risk of losing the occasional call from customers who have the old number on a label attached to a product or an instruction manual.
5. Start-up businesses frequently order several 800 numbers, corresponding to different products or divisions within the firm. While, initially, all of the 800 numbers are routed to the same telephone number (or receptionist), multiple numbers are ordered to avoid the cost and confusion of introducing new numbers as the firm grows.

The preceding are simply a sampling of the dozens of types of situations in which multiple 800 numbers are legitimately routed to a single service subscriber or 10 digit telephone number. To impose a presumption that businesses engaged in any such conduct (with the exception of telemarketing firms) are acting illegally, subject to civil and criminal sanctions, is not in the interest of service providers or their subscribers, nor will it achieve the objectives the Commission has set out in its Second Report and Order. If anything, it is likely to be an invitation to selective enforcement and other anti-competitive behavior by facilities-based carriers.

III. The Commission's New Rule Fails to Provide Adequate Guidance to Service Providers on How to Implement the Rebuttable Presumption

In the Second Report and Order, the Commission states that "[i]f a subscriber hoards numbers, that subscriber's service provider must terminate toll free service..." Second Report and Order, ¶ 42. The Commission, however, has not specified any procedures for service providers to follow in the event a subscriber is suspected of hoarding. Do service providers have the obligation to hold hearings and provide due process to subscribers suspected of hoarding due to the "rebuttable presumption"? To impose such an obligation on small service providers such as TLDP would result in an undue burden, and place service providers in the position of acting as policeman and judge with respect to their customer business practices.

Such an arrangement is also problematic because a user could suffer irreparable harm were a service provider to terminate service without adequate notice and opportunity to be heard before an objective decision maker. Even if such harm could be remedied by monetary damages, the tariffs of most service providers relieve them of liability for indirect or consequential damages. A service provider would be free to terminate toll free service to a legitimate, but low usage, subscriber, in order to transfer the number to another high volume customer. Thus, even were a service provider to act improperly with respect to the termination of 800 service pursuant to the rule, subscribers would probably not be made whole for the damages incurred during any period in which service was terminated or, even worse, if their number is reassigned to another user.

To circumvent these problems, TLDP respectfully urges the Commission to make

clear that the sole arbiter for determining whether hoarding or brokering occurs shall be the Commission, and not service providers, and that no service provider may terminate a customer's toll free service, or rescind a toll free number, without an affirmative determination by the Commission that hoarding and/or brokering has occurred. In this context, TLDP further urges the Commission to declare unlawful any tariff provisions of service providers which authorize such carriers to terminate toll free service, or rescind toll free numbers, for hoarding or brokering, absent an affirmative finding by the Commission.

IV. Application of the Rule in a Reseller Situation

In a reseller situation, the potential for injury to a subscriber not engaged in hoarding or other improper conduct is even greater. In the typical reseller situation, the facilities-based carrier sells service to the reseller, who then sells and invoices its end users/subscribers. The reseller is thus placed in the middle: a subscriber from the perspective of the facilities-based carrier, and a service provider from the perspective of the end user (its subscriber).

The facilities-based carrier does not know the identity of the end users/subscribers. Nonetheless, the rule creates a presumption of wrongdoing in the event more than one 800 number is routed to a single subscriber. The Second Report and Order does not indicate whether, in such a situation, the obligation to "terminate toll free service" falls on the facilities-based carrier or the reseller. TLDP submits that, if the Commission relinquishes the responsibility for adjudicating hoarding claims, it must be the reseller, because only the reseller knows the identity of the customer and, therefore, has the ability to determine whether the customer is engaged in hoarding.

Moreover, because a reseller is a single service subscriber from the perspective of the facilities-based carrier, placing the obligation on the facilities-based carrier would result in the immediate presumption that every reseller is engaged in hoarding. At best, this would require resellers to disclose to their facilities-based carriers proprietary information about their customers in order to overcome the presumption of hoarding, and to avoid termination of 800 service for their subscribers. To require disclosure of such information on a regular basis would prejudice resellers, adversely impacting the level of competition in the marketplace.³

WHEREFORE, TLDP respectfully requests the Commission to remove the rebuttable presumption of hoarding from Section 52.107 of its rules, and to declare that the Commission has the sole authority to adjudicate hoarding claims. Alternatively, should the Commission deem that there is a need for such a presumption, TLDP urges the Commission to (1) provide guidelines for service providers as to how it expects them to enforce the rule, including within such guidelines the basic elements of due process; (2) determine that it is the reseller, and not the facilities-based carrier, who has the obligation

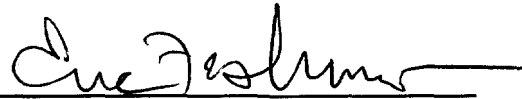
³ TLDP has already had the experience of having one of the three largest facilities-based carriers in the country using such information for the purpose of sales efforts aimed at converting TLDP customers to its own services.

to enforce the rule in a resale scenario; and (3) expand the telemarketing exception to include all of the situations referenced above, and any other business application which has a legitimate economic purpose.

Respectfully submitted,

TLDP COMMUNICATIONS, INC.

By:

A handwritten signature in dark ink, appearing to read "Eric Fishman", written over a horizontal line.

Eric Fishman

Fletcher, Heald & Hildreth, PLC
1300 North 17th Street
11th Floor
Rosslyn, VA 22209
(703) 812-0400

May 27, 1997

CERTIFICATE OF SERVICE

I, Eric Fishman, do hereby certify that on this 27th day of May, 1997 a copy of the foregoing Petition for Reconsideration was sent by first class United States mail, postage prepaid, to the following:

Genevieve Morelli
Vice President and General Counsel
The Competitive Telecommunications Association
1140 Connecticut Avenue, NW
Suite 420
Washington, DC 20036

Susan Drombetta
Scherers Communications Group, Inc.
575 Scherers Court
Worthington, OH 43085

Ian D. Volner
N. Frank Wiggins
Venable, Baetjer, Howard & Civiletti, LLP
1201 New York Avenue, NW
Suite 1000
Washington, DC 20005

Christopher G. McGann
Vice President
1-800-FLOWERS
1699 Steward Avenue
Westbury, NY 11590

Roy L. Morris
Allnet Communications Services, Inc.
1990 M Street, NW, Suite 500
Washington, DC 20036

Albert Halprin
Melanie Haratunian
Halprin, Temple, Goodman & Sugrue
1100 New York Avenue, NW
Suite 650 East Tower
Washington, DC 20554

Gary L. Phillips
Ameritech
1401 H Street, NW, Suite 1020
Washington, DC 20005

Robert L. Lynch
Durward D. Dupre
J. Paul Walters, Jr.
Southwestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, MO 63101

Eugene J. Baldrate
The Southern New England Telephone Company
227 Church Street
New Haven, CT 06510

Judith St. Ledger-Roty
Lee A. Rau
Reed Smith Shaw & McClay
1301 K Street, NW
Suite 1100 East Tower
Washington, DC 20005

Gregory L. Cannon
US West Communications, Inc.
Suite 700
1020 19th Street, NW
Washington, DC 20036

Lucille M. Mates
Sarah Rubenstein
Pacific Bell and Nevada Bell
140 New Montgomery Street, Rm. 1522A
San Francisco, CA 94105

James L. Wurtz
Margaret E. Garber
Pacific Bell and Nevada Bell
1275 Pennsylvania Avenue, NW
Washington, DC 20004

Carl W. Northrop
Bryan Cave LLP
700 Thirteenth Street, NW
Suite 700
Washington, DC 20005

Mark Stachiw
AirTouch Paging
Three Forest Plaza
12221 Merit Drive, Suite 800
Dallas, TX 75251

David R. Poe
Leboeuf, Lamb, Greene & MacRae, LLP
1875 Connecticut Avenue, NW
Suite 1200
Washington, DC 20009

Colleen L. Boothby
Laura F.H. McDonald
Levine, Blaszak, Block & Boothby
1300 Connecticut Avenue, NW
Suite 500
Washington, DC 20036

Mary McDermott
Linda Kent
Charles D. Cosson
United States Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005

D. Kelly Daniels
Bradley W. Prentiss
Telco Planning, Inc.
808 The Pittock Block
821 S.W. Washington Street
Portland, OR 97205

M. Robert Sutherland
Richard M. Sbaratta
Helen A. Shockey
BellSouth Telecommunications, Inc.
4300 Southern Bell Center
675 West Peachtree Street, NE
Atlanta, GA 30375

Andrew D. Lipman
Russell M. Blau
Swidler & Berlin, Chartered
3000 K Street, NW
Washington, DC 20007

Catherine Wang
William B. Wilhelm, Jr.
Swidler & Berlin, Chartered
3000 K Street, NW
Washington, DC 20007

Edwin N. Lavergne
Darren L. Nunn
Ginsburg, Feldman and Bress, Chartered
1250 Connecticut Avenue, NW
Washington, DC 20036

Jeffrey D. Knowles
Gary D. Hailey
Venable, Baetjer, Howard & Civiletti
1201 New York Avenue, NW
Washington, DC 20005

Gregory M. Casey
Victoria A. Schlesinger
Telemation International, Inc.
6707 Democracy Boulevard
Suite 800
Bethesda, MD 20817

Charles H. Helein
Helein & Associates
8180 Greensboro Drive, Suite 700
McLean, VA 22102

Cheryl A. Tritt
Joan E. Neal
Morrison & Foerster
2000 Pennsylvania Avenue, NW
Suite 5500
Washington, DC 20006

J. Kristen Liesemer
Unitel Communications Inc.
200 Wellington Street West
Toronto, Ontario MSV 3G2
Canada

Glenn B. Manishin
Christy C. Kunin
Blumenfeld & Cohen
1615 M Street, NW, Suite 700
Washington, DC 20036

Michael Zivich
Spiegel, Inc.
800 Pasquinelli Drive
Westmont, IL 60559

William Rassman, MD
New Hair Institute
9911 W. Pico Boulevard
Suite 301
Los Angeles, CA 90035

Glen A. Payne
Senior Vice President, Secretary & General Counsel
Invesco Funds Group, Inc.
7800 East Union Avenue
Denver, CO 80237

Wayne C. Rapp
Vice President
Crestar Bank
7818 Parham Road
Richmond, VA 23294

Gail M. Meyer
Vice President
Olsten Corporation
175 Broad Hollow Road
Melville, NY 11747-8905

Joel DeFabio, Esq.
2121 Ponce De Leon Boulevard
Coral Gables, FL 33134

Robert M. Schwimer
1-800-BEARGRAM
c/o SISCO
1390 Richmond Terrace
Staten Island, NY 10310

Glenn S. Richards
Fisher, Wayland, Cooper, Leader & Zaragoza LLP
2001 Pennsylvania Avenue, NW
Suite 400
Washington, DC 20006

Matthew O'Brien
Londa Hamilton
Communications Managers Association
1201 Mt. Kemble Avenue
Morristown, NJ 07960-6628

David A. Urman
Bass Tickets, Inc.

John V. Kenny
President/COO
US Strategies Corp.
1055 N. Fairfax Street, Suite 201
Alexandria, VA 22314

T. Michael Jankowski
Gregory M. Scott
Collier, Shannon, Rill & Scott
3050 K Street, NW
Washington, DC 20007

Leon M. Kestenbaum
Jay C. Keithley
Norina T. Moy
Sprint Corporation
1850 M Street, NW
Suite 1110
Washington, DC 20036

Douglas W. Kinkoph
LCI International, Inc.
8180 Greensboro Drive
Suite 800
McLean, VA 22102

Loretta J. Garcia
Donald J. Elardo
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, NW
Washington, DC 20006

John M. Goodman
Edward D. Young, III
Bell Atlantic Telephone Companies
1133 20th Street, NW
Washington, DC 20036

Lawrence f. Chesto
Aeronautical Radio, Inc.
2551 Riva Road
Annapolis, MD 21401

Mark J. Golden
Personal Communications Industry Association
1019 19th Street, NW
Suite 1100
Washington, DC 20036

Richard S. Whitt
Worldcom, Inc.
d/b/a LDDS WorldCom
1120 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Susan M. Miller
Vice President and General Counsel
Alliance for Telecommunications Industry Solutions
1200 G Street, NW, Suite 500
Washington, DC 20005

William J. Balcerski
NYNEX Telephone Companies
1111 Westchester Avenue
White Plains, NY 10604

Mark C. Rosenblum
Peter H. Jacoby
Judy Sello
AT&T Corp.
Room 3244J1
295 North Maple Avenue
Basking Ridge, NJ 07920

Wayne V. Black
C. Douglas Jarrett
Keller and Heckman
1001 G Street, NW
Suite 500 West
Washington, DC 20001

Emily C. Hewitt
Vincent L. Crivella
Michael J. Ettner
Jody B. Burton
General Services Administration
18th & F Streets, NW, Room 4002
Washington, DC 20405

Gary V. Pack
Service Merchandise Company, Inc.
P.O. Box 24600
Nashville, TN 37202-4600

Joe D. Edge
Sue W. Bladdek
Elizabeth A. Marshall
Drinker, Biddle & Reath
901 Fifteenth Street, NW, Suite 900
Washington, DC 20005

Charles C. Hunter
Kevin S. DiLallo
Hunter & Mow, PC
1620 I Street, NW
Suite 720
Washington, DC 20006

David J. Gudino
GTE Service Corporation
1850 M Street, NW, Suite 1200
Washington, DC 20036

David Cosson
Pamela Sowar
National Telephone Cooperative Association
2626 Pennsylvania Avenue, NW
Washington, DC 20037

Lisa M. Zaina
OPASTCO
21 Dupont Circle, NW, Suite 700
Washington, DC 20036

Rachel J. Rothstein
Deena M. Mistretta
Cable & Wireless, Inc.
8219 Leesburg Pike
Vienna, VA 22182

Regina Keeney, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 500
Washington, DC 20554


Eric Fishman